IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.411 OF 2005

Shri Maruti Gundu Jadhav & ors. .. Appellants

Versus

Smt. Gaurabai Laxman Halgekar .. Respondent

Mr.N.V.Bandiwadekar for appellants

Mr.S.S.Redekar for respondent

CORAM : P.V.KAKADE, J.

DATE : 8TH JUNE, 2005.

P.C.:

1. The appellant has preferred this appeal against the judgment and order dated 18th February 2005 passed by Addl. District Judge, Gadhinglaj dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, Gadhinglaj decreeing the suit for possession of the suit property.

2. I have heard the learned counsel for both the parties. Perused the available record.

3. The plaintiff filed the suit for recovery of possession with the consequent relief of mesne profits in respect of an agricultural land bearing Block No..4 comprised of Old Survey No.375/2 to the extent of 1/2 share as fully described and identified by the hand sketch map annexed to the plaint. It is the case of the plaintiff that her father Bayappa Bhagoji Kamble was the owner of the suit land. Her father had bequeathed the suit land in her favour by executing the Will Deed. Her name had been entered as the owner by virtue of the said Will Deed. The plaintiff thus acquired the title of the suit land by testamentary succession. The father of the plaintiff was in possession during his life time and since his demise the plaintiff came into possession. It was the case of the plaintiff that on account of demise of her husband the defendants have forcibly dispossessed her from the suit land and refused to deliver the possession and hence the suit came to be filed.

4. The defendant contested the suit, inter alia,

submitting that the plaintiff was the owner but was not in possession. The father of the plaintiff was indebted in the year 1971 and therefore Bayappa had taken Rs.910/= from the defendant no.4 and Bakappa. He was to pay off the debts of one Mahadeo with whom the land in question was mortgaged. Since making the payment Mahadeo, the defendant no.4 and Jakappa Patil were put in possession. It was also contended that on 18.8.1973, Bayappa agreed to sell the suit land to defendant no.4 and Jakappa and accepted Rs.1000/= as an earnest money since execution of an agreement in their favour. Bayappa Kamble even thereafter had obtained the amount from time to time from defendants.4 and Jakappa, the defendant no.4 and Jakappa Patil also cleared the loan of Rs.1818/= obtained from the Land Development Bank. Therefore, Bayappa had accepted the amount of Rs.4500/= towards an agreement to sale entered into their favour. On 29.10.1975 he again executed an agreement and therefore, defendants were in possession from the year 1971 and allegation of dispossession is specifically denied. According to the defendants they have invested the sum of Rs.40,000/= to improve the property and hence the suit was sought to be dismissed.

5. The learned trial judge adjudicated the dispute on merits holding that the property in question was in Bayappa's possession till the year 1971. However, it was held that the plaintiff had failed to prove that by virtue of Will Deed executed by Bayappa the plaintiff had come in possession of the suit land. It was also held that the defendant had dispossessed the plaintiff in the year 1986. It was further held that the defendants had failed to establish their adverse title as claimed and finally it was concluded that the plaintiff was entitled to the relief of possession of the property and suit was decreed accordingly. The appeal was preferred to the Court of Addl. District Judge, Kolhapur. The learned District Judge adjudicated the dispute on merits and confirmed the findings recorded by the learned trial judge and dismissed the appeal. Hence the present appeal.

6. At the outset it may be noted that there is no substantial question of law involved in this appeal and all the issues pertaining to the dispute relate to the factual aspects and evidence led thereon. The only issue sought to be urged on behalf of the appellant is regarding the protection contemplated by the provision

of Section 53-A of the Transfer of Property Act. It is the case of the appellant that the trial judge had held that though there was evidence to show that the defendants were ready and willing to perform their part of the contract, there was no pleading to that effect and as such on that basis the suit came to be decreed in favour of the plaintiff. In the result in the course of the appeal before the District Judge, the written statement was amended and such so called lacuna was filled up in. However, the fact remains that no additional evidence in support of such pleading was led by the concerned defendant. It was submitted on behalf of the appellant that the defendant had stated on oath that he was ready and willing to perform his part of the contract and accordingly by virtue of amendment of written statement such pleading was specifically impleded in the written statement, and therefore, the suit could not have been decreed by the courts below. In my considered view, this cannot be a substantial question of law, especially when there is no independent and cogent evidence led, except for bare word of the defendant to show that in fact the defendant was ready and willing to perform his part of the contract in order to seek protection of Section 53-A of the Transfer of

Property Act.

6. In this regard it must be noted that both the courts below have rightly concluded that the protection of Section 53-A of the Act is not available to the concerned defendant and therefore, the plaintiff is entitled to a decree for possession. In view of these concurrent findings and the fact that there is no question of law involved, I am of the view that no interference is called for in this appeal.

7. In the result the appeal stands dismissed. Consequently the civil application no.706 of 2005 also stands dismissed.

******